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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE BETETA,

Defendant and Appellant.

B187392

(Los Angeles County
Super. Ct. No. BA280340)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Stephen A. Marcus, Judge. Affirmed in part, reversed in part and remanded.

Linn Davis, under appointment by the Court of Appeal, for Defendant and
Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillete, Chief Assistant
Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven D.
Matthews and Shawn McGahey Webb, Deputy Attorneys General, for Plaintiff and
Respondent.

INTRODUCTION

A jury convicted defendant and appellant Jose Beteta of carjacking, second degree robbery, dissuading a witness by force or threats, and criminal threats. As to all counts, the jury found true gang enhancement allegations under Penal Code section 186.22, subdivision (b)(1). On appeal, Beteta contends that the true findings on the gang enhancement allegations must be reversed because, first, his trial counsel was ineffective for failing to move to dismiss those allegations; second, there is insufficient evidence to support the true findings; third, the jury was not instructed on the gang enhancement; and, fourth, the prosecutor used inconsistent and irreconcilable theories to obtain life sentences for Beteta while obtaining a four-year sentence for his coparticipant in the crime. We hold that there is insufficient evidence to support the gang enhancement as to three of the counts, and we reverse the true findings. We also hold that the failure to instruct the jury on the gang enhancement was not harmless error, and we therefore reverse the true finding on the remaining count and remand.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background.

A. *The carjacking and robbery.*

Erika Ahumada worked for Karina Reyes at a beauty salon. Reyes was dating Alex Serrano, who worked at the car alarm store next door. Beteta was often at the car alarm store, and Ahumada would see him around and talk to him. Beteta, who limped, told Ahumada he had been shot in the foot. He also showed her a tattoo, which said “BEST.” Beteta explained it meant he was the best. Although Beteta and Ahumada weren’t dating, Beteta once offered to help Ahumada with her sick daughter, and, when she declined, he went to her house and they talked.

Late on the evening of March 14, 2005, Ahumada, Beteta, Reyes, Serrano, and Guillermo De Los Angeles (Beteta’s friend) went to a restaurant to celebrate Beteta’s birthday. During the two hours they were there, Beteta and De Los Angeles got drunk. Around midnight, a security guard helped Ahumada get Beteta and De Los Angeles, both of whom were too drunk to walk, into her car. The trio left, with Ahumada driving.

They had not been driving long when De Los Angeles told Ahumada to run a red light. Beteta told Ahumada to do what his “brother” said. She ran through one red light, and eventually got on the freeway. De Los Angeles was drunk, agitated, and angry. Beteta tried to calm him down. De Los Angeles hit Ahumada’s face and told her to shut up. Beteta told Ahumada to listen to his brother. Ahumada exited the freeway, and the men continued to direct her. A police car drove by and they told her not to do anything. Beteta, while pulling her hair, told her that if she did something, he’d kill her.¹

They drove to the beauty salon. When Ahumada stopped the car, De Los Angeles twisted her hand, hit her face, and took her car keys. He and Beteta pulled her out of the car. De Los Angeles told Ahumada he would kill her and her daughter if she talked to the police. He told her to give him everything she had on, and she gave him her earrings and rings. After De Los Angeles took the jewelry, Ahumada asked Beteta to let her go, because her daughter was sick and Ahumada wanted to go home. Beteta grabbed her by the collar, punched her in the jaw, and said, “This is for your daughter.” One of them told her to go or they would kill her. She ran. De Los Angeles and Beteta left in Ahumada’s car, but they crashed it and fled the scene.

Ahumada never saw either man flash hand signs that night. She also never heard Beteta referred to by any name other than “Jose.” She did not know that Beteta, De Los Angeles or Serrano were gang members.

B. *The subsequent shooting.*

Later, on March 15, 2005, Beteta and De Los Angeles returned to a back house Beteta rented from Maria Escobar, who lived in a front house. Around 2:00 a.m., Maria woke up her son, Franklin Escobar. Franklin, Maria, and Franklin’s wife (Flor de Maria) went outside. One of Franklin’s cars was damaged, and the window of a second car was shattered. Beteta and De Los Angeles, both of whom were drunk, were outside. Beteta said that “Shorty” shattered the window.

¹ This threat formed the basis of count 3, dissuading a witness by force or threats.

Franklin told Beteta that they would talk about it tomorrow, but Beteta said they would talk about it “now.” De Los Angeles urged Beteta to leave, but Beteta swore at Franklin, saying that he would “kick” Franklin’s “ass,” that Franklin would “regret it,” and that Beteta would kill him. Beteta and De Los Angeles left in a car, which De Los Angeles was driving. Franklin, however, heard a “click” and saw a flame. Beteta was hanging out of a car passenger window. Gunshots were fired, but nobody was hurt.

Neither Franklin nor Flor nor Maria could remember Beteta saying, “This is 18th Street.” But an officer testified that Franklin told him after the shooting that Beteta had said, “Yeah, puto. I’m going to kill you. This is 18th Street.” Flor had also told the officer that she heard Beteta make these statements. In addition, although nobody had warned them against testifying, Franklin, Maria, and Flor were nervous about testifying. At his mother’s behest, Franklin asked an officer about the witness protection program, although nobody had threatened them.

C. *Reyes contacts Ahumada about testifying.*

After these incidents, Reyes, Ahumada’s former boss at the beauty salon, called her. Reyes told Ahumada that Beteta said for her to please say she was drunk that night and that she couldn’t remember anything.²

II. **Procedural background.**

Beteta was charged with: count 1 for carjacking Ahumada (Pen. Code,³ § 215, subd. (a)); count 2 for second degree robbery of Ahumada (§ 211); count 3 for dissuading a witness, Ahumada, by force or threat (§ 136.1, subd. (c)(1)); count 4 for criminal threats against Franklin Escobar (§ 422); count 5 for the attempted murder of Franklin Escobar (§ 187, subd. (a), 664); count 6 for the attempted murder of Flor Escobar (§ 187,

² Ahumada initially testified that she was at a store when she saw someone who worked at the alarm store next to the beauty salon. This person asked when was her court appearance and told her that all she had to say was she was drunk. Ahumada, however, admitted that she had lied about this incident; it never occurred.

³ All further undesignated statutory references are to the Penal Code.

subd. (a), 664); and count 7 for the attempted murder of Maria Escobar (§ 187, subd. (a), 664).⁴ Personal gun use was alleged as to counts 5, 6, and 7 under section 12022.53, subdivisions (b) and (c). As to all counts, it was alleged that the offenses were committed for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further and assist in criminal conduct by gang members within the meaning of section 186.22, subdivision (b).

After Ahumada testified at the preliminary hearing, the prosecutor informed the court that the People did not intend to proceed on the gang enhancement allegations as to counts 1, 2, and 3 concerning the Ahumada incident. The People then called Officer Mixer, who testified that counts 5, 6, and 7 were committed for the benefit of the gang. An information filed after the preliminary hearing reflected the dismissal of the gang allegations as to counts 1, 2, and 3.

Thereafter, De Los Angeles entered into a plea agreement.⁵ The People then filed an amended information deleting references to De Los Angeles. Although the prosecutor informed that court he had “made sure all of the gang allegations are properly alleged as to counts 1 through 7,” the amended information realleged the gang enhancements as to counts 1, 2, and 3 against Beteta. Defense counsel did not object to the amended information. Instead, he waived reading the amended information, and Beteta pled not guilty and denied all special allegations.

The matter proceeded to a trial by jury. On October 7, 2005, the jury found Beteta guilty of carjacking (count 1), second degree robbery (count 2), dissuading a witness, Ahumada, by force or threat (count 3), and criminal threats against Franklin Escobar (count 4). The jury found true the gang enhancement allegations as to all four counts.

⁴ De Los Angeles was charged with counts 1-3. The trial court dismissed counts 4-7 as to him, but added a count 8 for accessory after the fact (§ 32).

⁵ De Los Angeles pled guilty to carjacking and second degree robbery. He was sentenced to three years for carjacking plus one year for the second degree robbery, for a total of four years.

The jury, however, found Beteta not guilty of the three counts of attempted murder. On November 10, the trial court sentenced Beteta to 15 years to life on count 1 consecutive to 2 years plus 5 years under section 186.22, subdivision (b), on count 4. The court also sentenced Beteta to a consecutive 7 years to life on count 3. The court imposed but stayed an upper term sentence of 5 years plus 10 years under section 186.22, subdivision (b), on count 2.

DISCUSSION

Although Beteta challenges the true findings on the gang enhancement on three grounds, we begin with the sufficiency of the evidence, because that issue is dispositive of the appeal as to counts 1, 2, and 3. We then address the trial court's failure to instruct the jury on the gang enhancement, which disposes of the appeal as to count 4.

I. Sufficiency of evidence of the gang enhancement as to counts 1, 2, and 3.

A. Additional facts concerning gang evidence.

1. The People's gang expert.

Officer Guillermo Mixer testified for the People as a gang expert. There are about 20,000 documented 18th Street gang members. The gang's primary activities are murder, attempted murder, extortion, drive-bys, vandalism, mayhem, rape, and carjacking. "BEST," which is tattooed on Beteta's back, identifies 18th street gang members. It means "Barrio 18th Street." Members of the gang have been convicted of various crimes. For example, Juan Jose Carranza was convicted of murder in 2004. Ezequiel Hinojosa was convicted of possession of cocaine base for sale.

Officer Mixer first met Beteta in January 2005, at which time Beteta admitted he was an 18th Street gang member, although he said he didn't gang bang anymore. His moniker is "Boxer." Based on Beteta's tattoo, his admission, and the statements of other gang members, it is Officer Mixer's opinion that Beteta is an 18th Street gang member. De Los Angeles and Serrano are also members of the 18th Street gang, and they both have tattoos identifying them as gang members.

The three crimes involving Ahumada—the carjacking, robbery, and witness dissuasion—were committed in association with a criminal street gang. Officer Mixer based his opinion on the facts that two gang members, De Los Angeles and Beteta, were working in concert. “Their tie . . . is so strong that even if he had a romantic notion with Ms. Ahumada, that was not strong enough to break his time with Mr. De Los Angeles and [he] went ahead and robbed her of her property, beat her up and took her car. [¶] That car could have been used, if they wouldn’t have crashed it, in other crimes. That’s what they do: Steal cars, do drive-bys, rob banks, commit crimes with those vehicles.”

According to Officer Mixer, even though neither Beteta nor De Los Angeles mentioned 18th Street during the crimes, they were still done in association with the gang because the crimes bolster reputations in the gang and raises a member’s status. Beating up a woman is a “crazy act of what they’re doing, of them not caring for anybody, and, in the eyes of the gang members, that’s respectable.” Moreover, if a fellow gang member is carjacking someone and you don’t help, you will be disciplined.

2. Beteta’s gang expert.

Michael Munoz, a retired police officer, testified that there was nothing specifically indicative of gang activity when given the scenario of three gang members who go out with two women to a restaurant to celebrate a birthday. Drinking is also not something that is specifically unique to gang culture. It “would be a stretch, if you were socializing with someone all evening, to then have a change of mental disposition and want to rob them. It’s possible, but I wouldn’t think, generally, that would go hand in hand, no, . . .”

B. *Sufficiency of the evidence standard of review.*

To determine whether the evidence was sufficient to sustain a criminal conviction, we review the entire record in the light most favorable to the judgment to decide “ ‘whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ [Citations.]” (*People v. Hillhouse* (2002) 27 Cal.4th 469, 496.) “We draw all reasonable inferences in support of the judgment. [Citation.]”

(*People v. Wader* (1993) 5 Cal.4th 610, 640.) Reversal is not warranted unless it appears “ ‘that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].’ [Citation.]” (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

C. *There is insufficient evidence to support the gang enhancement.*

Beteta contends there is insufficient evidence to support the “association” element of the gang enhancement allegations as to counts 1, 2, and 3. We agree.

Section 186.22, subdivision (b)(1) provides, “[A]ny person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members” shall be subject to additional punishment as further defined in section 186.22, subdivision (b). (§ 186.22, subd. (b)(1); see also *People v. Gardeley* (1996) 14 Cal.4th 605, 617.) Under that section, it is not necessary to show the crime was committed to benefit the gang if it is shown that the crime was committed in association with the gang. (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1198 (*Morales*).)

Morales discussed what evidence is sufficient to show that a crime was committed in association with a gang. In *Morales*, the defendant and two other members of a gang robbed occupants of a house. (*Morales, supra*, 112 Cal.App.4th at pp. 1179-1183.) During the robbery, the defendant’s coparticipants murdered one of the occupants. The defendant was convicted of robbery, and his sentence was enhanced under section 186.22, subdivision (b)(1). On appeal, the defendant argued that there was insufficient evidence to support the enhancement because the trial testimony showed only that he and his coparticipants in the robbery belonged to the same gang. (*Id.* at p. 1197.) The court said that such evidence might be insufficient to establish the crime was committed for the gang’s *benefit*, but the “crucial element . . . requires that the crime be committed (1) for the benefit of, (2) at the direction of, or (3) in *association* with a gang.” (*Id.* at p. 1198.) The court went on, “Thus the typical close case is one in which one gang member, acting alone, commits a crime. Admittedly, it is conceivable that several gang members could commit a crime together, yet be on a frolic and detour unrelated to the gang. Here,

however, there was no evidence of this. Thus, the jury could reasonably infer the requisite association from the very fact that defendant committed the charged crimes in association with fellow gang members.” (*Ibid.*) Although *Morales* held that the mere fact that a defendant commits a crime in association with a fellow gang member can satisfy the association element of the gang enhancement, the court nevertheless indicated that the association element may be negated by evidence that the defendant and his gang cohorts are on a “frolic and detour unrelated to the gang.”

Such evidence exists here.⁶ Before the evening in question, Beteta and Ahumada were friendly acquaintances. For example, Beteta had offered to help Ahumada when her daughter was sick. Ahumada accepted an invitation to celebrate Beteta’s birthday with him and his friends. At that celebration, Beteta, and his friend, De Los Angeles, got so drunk that a security guard had to help Ahumada get Beteta and De Los Angeles into the car. Throughout the remainder of their time with Ahumada, neither De Los Angeles nor Beteta made any reference to the 18th Street gang. There was also no evidence that Beteta or De Los Angeles were wearing gang colors or clothes during the offense or otherwise displayed gang insignia. Ahumada did not know that Beteta and De Los Angeles were gang members. She never heard Beteta referred to as anything other than “Jose.” On these facts, Beteta and De Los Angeles were on a drunken “frolic and detour” unrelated to the 18th Street gang.

We reach this conclusion notwithstanding Officer Mixer’s expert testimony that the crimes Beteta committed against Ahumada were committed in association with the 18th Street gang. Officer Mixer basically testified that Beteta could brag about the crimes to his fellow gang members and that commission of the crimes would bolster his reputation. In addition, Beteta had to help De Los Angeles, his fellow gang member, or risk being disciplined. Although certainly expert opinion in cases involving a gang enhancement is proper (see, e.g., *People v. Ferraez* (2003) 112 Cal.App.4th 925, 930;

⁶ The prosecutor stated he was proceeding on an “in association with” theory, rather than under a theory that the crimes benefited the gang.

People v. Romero (2006) 140 Cal.App.4th 15, 18), Officer Mixer’s testimony is insufficient to establish the essential association element. Rather, his testimony essentially converts every offense committed by a gang member into one that falls under section 186.22, subdivision (b)(1); a gang member can certainly brag about any crime he or she commits. His testimony also renders irrelevant the implication in *Morales* that gang members *can* commit crimes unrelated to the gang. *Morales* recognized that such crimes can occur, and, we think, the evidence shows that this is one.

We therefore reverse the true findings on the gang enhancement as to counts 1, 2, and 3.

II. Count 4 is reversed and remanded because the failure to instruct the jury on the gang enhancement was not harmless error.

Even if we concluded that there was sufficient evidence to support the gang enhancement as to counts 1, 2, and 3, this matter would still have to be reversed and remanded as to those counts, as well as to count 4,⁷ because of the trial court’s failure to instruct the jury with CALJIC 17.24.2.⁸

⁷ Beteta does not challenge the sufficiency of the evidence as to count 4, criminal threats against Franklin Escobar.

⁸ CALJIC 17.24.2 provides: “It is alleged in Count[s] _____ that the crime[s] charged [was] [were] committed for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.

“ ‘Criminal street gang’ means any ongoing organization, association, or group of three or more persons, whether formal or informal, (1) having as one of its primary activities the commission of one or more of the following criminal acts, _____, (2) having a common name or common identifying sign or symbol and (3) whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

The People concede the error, but contend it is harmless under *People v. Sengpadychith* (2001) 26 Cal.4th 316 (*Sengpadychith*.) *Sengpadychith* concluded that the failure to instruct on a gang enhancement in cases such as this one is governed by the harmless error standard in *Chapman v. California* (1967) 386 U.S. 18, 24, namely, whether the prosecution has proved beyond a reasonable doubt that the error did not contribute to the jury's verdict.⁹ (*Sengpadychith*, at pp. 320, 326.)

The People contend that the failure to instruct the jury with CALJIC 17.24.2 was harmless and its omission was remedied by the reading of the charges to the jury, opening

“ ‘Pattern of criminal gang activity’ means the [commission of] [, or] [attempted commission of] [, or] [conspiracy to commit] [, or] [solicitation of] [, or] [sustained juvenile petition for] [, or] [conviction of] two or more of the following crimes, namely, _____, provided at least one of those crimes occurred after September 26, 1988, and the last of those crimes occurred within three years after a prior offense, and the crimes were committed on separate occasions, or by two or more persons.

“The phrase ‘primary activities,’ as used in this allegation, means that the commission of one or more of the crimes identified in the allegation, be one of the group’s ‘chief’ or ‘principal’ occupations. This would of necessity exclude the occasional commission of identified crimes by the group’s members. In determining this issue, you should consider any expert opinion evidence offered, as well as evidence of the past or present conduct by gang members involving the commission of one or more of the identified crimes, including the crime[s] charged in this proceeding.

“The People have the burden of proving the truth of this allegation. If you have a reasonable doubt that it is true, you must find it to be not true.

“Include a special finding on that question, using the form that will be supplied to you.

“The essential elements of this allegation are:

“1. The crime[s] charged [was] [were] committed for the benefit of, at the direction of, or in association with a criminal street gang; and

“2. [These] [This] crime[s] [was] [were] committed with the specific intent to promote, further, or assist in any criminal conduct by gang members.”

⁹ *Sengpadychith* held that the *Chapman* standard applies to instructional errors in cases involving felonies *not* punishable by an indeterminate term of imprisonment for life, but that the *People v. Watson* (1956) 46 Cal.2d 818, 836 standard applies to felonies where the gang enhancement provision does not increase the maximum term of imprisonment and instead requires the defendant to serve at least 15 years of the sentence before becoming eligible for parole. (*Sengpadychith*, at p. 320.)

and closing statements, and the evidence. Certainly, the trial court, at the beginning of voir dire read the charges and the elements of the gang enhancement to the jury, and both the prosecutor and the defense discussed those elements in their arguments in some detail.¹⁰ (See, e.g., *People v. Mai* (1994) 22 Cal.App.4th 117, 126 [instruction's omission of a standard was harmless where closing arguments conveyed the proper standard to the jury], disapproved on another ground by *People v. Nguyen* (2000) 24 Cal.4th 756, 758.)

¹⁰ For example, the prosecutor argued, “And the street-gang allegation is that the defendant committed these crimes for the benefit of, at the direction or in association with 18th Street criminal street gang and with the specific intent to promote, further or assist in any criminal conduct by gang members. Now, the important part here is the ‘in association with.’ It’s not required that I prove all three: For the benefit of, at the direction of, and in association with. It’s just one of those. And in this case both the expert that I presented and the [defense] expert . . . agreed that . . . the robbery and carjacking, they were done in association with Sad Boy [De Los Angeles] from 18th Street. Assuming that you find that to be true, this is in association with a criminal street gang. [¶] So the first key to guilt is that [] Beteta helped a fellow gang member commit a robbery and a carjacking. . . .” “The street-gang allegation that I explained to you earlier involves that ‘in association with.’ Well, what in this case should lead you to believe that this was in association with a criminal street gang? Boxer and Sad Boy work in association with each other how? [¶] Both experts agree that during the carjacking and during the robbery these two men were working in concert. They were doing things as homeboys and as associates. The crimes against the Escobar family were both for the benefit of and in association with a criminal street gang. As Mr. Munoz, the defense investigator, even said to us yesterday, when Mr. Beteta is in Mr. Franklin Escobar’s face saying: ‘This is 18th Street,’ Mr. Beteta knows that he has an insurance policy. That’s what he called Mr. De Los Angeles, . . . When you commit a crime with your fellow gang member, with your homeboy, you have an insurance policy. . . .” “Unfortunately, for me, I’ve had to become a fan of Sesame Street. You watch Big Bird and you watch Elmo, and you know what that’s all about. . . . If I went up to somebody and said, ‘This is Sesame Street,’ that means absolutely nothing. I would not be in association with Sesame Street because they have no clout. But think about what is going through Mr. Beteta’s mind at the time he starts throwing out ‘18th Street.’ He knows where he’s from. He knows the currency that that carries on the street, and when he says: ‘This is on 18th Street,’ immediately the person receiving that threat knows that he means business.”

Notwithstanding that the jury could have cobbled together the elements of the enhancement from counsel's argument, we think it is unlikely, given the jury's question. During deliberations, the jury asked: "We request clarification on the guidelines for the special allegations in relation to the seven counts." The court told the jury that, according to its reading of the question, the answer was that the gun allegations go to counts 5, 6, and 7, the attempted murder charges, and that the gang allegations go to all seven counts. Juror No. 6 then said, "Yes, but I am still not clear. What we're basically trying to establish is how we should vote on these allegations, like—" The court responded, "Well, I probably need to really tell you to reread the instructions in that regard, but you don't get to the allegations until you make some decision about the individual counts." Juror No. 6 said he or she understood, and the court said that the jurors could write another question if they wanted to. The jury thereafter returned its verdict, finding true the gang enhancement allegations as to counts 1 through 4.

The People dismiss the jury's question as merely concerning "the correlation of the special allegations to the substantive counts, not confusion regarding the elements of the gang enhancement" We do not agree that the question can be so easily dismissed as unrelated to the substantive elements of the gang enhancement. Rather, we think it is very likely that the jury's question concerned the gang enhancement because the question referred to the "special allegations in relation to the seven counts." Only the gang enhancement went to all seven counts. Moreover, Juror No. 6 indicated that the court's response did not answer the jury's question. The trial court told the jury to refer to the instructions, but, of course, the instructions would not have helped the jury in deciphering the gang enhancement, given the absence of CALJIC 17.24.2.

The jury's question, which appears to be related to the very enhancement for which instruction was omitted, coupled with the lack of or contradictory evidence concerning the enhancement, compels us to conclude that the error was not harmless. As to counts 1, 2, and 3, as we have discussed above, there was insufficient evidence of the enhancement. The evidence as to count 4, criminal threats, was also not overwhelming. Franklin Escobar denied that Beteta referred to 18th Street, although an investigating

officer testified that Escobar reported that Beteta did say this. Thus, given the state of the evidence, the jury's question, and the lack of instruction, the jury's true finding as to count 4 must be reversed.¹¹

DISPOSITION

The true findings on the Penal Code section 186.22, subdivision (b)(1), gang enhancement as to counts 1, 2, and 3 is reversed. The true finding on the gang enhancement as to count 4 is reversed and remanded for proceedings consistent with this opinion. The judgment is otherwise affirmed.

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ALDRICH, J.

We concur:

CROSKEY, Acting P. J.

KITCHING, J.

¹¹ Our conclusion that the failure to instruct the jury with CALJIC 17.24.2 was not harmless error applies to counts 1, 2, and 3. But because we reverse the true finding on the gang enhancement as to those counts based on the insufficiency of the evidence to support the finding, the instructional error is not relevant to those counts.

Also, based on the disposition, we need not reach Beteta's remaining claims that his trial counsel rendered ineffective assistance and that the People used irreconcilable and inconsistent theories to obtain two life sentences, in violation of his due process rights and of section 1170, subdivision (a)(1).